UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOUTHERN OCEAN MEDICAL CENTER, **JERSEY SHORE UNIVERSITY MEDICAL CENTER,** **PALISADES MEDICAL CENTER,** **AND THE HARBORAGE,** **A DIVISION OF HMH HOSPITALS CORP.,** Respondent, and **HEALTH PROFESSIONALS AND ALLIED EMPLOYEES,** Charging Party.	Case Nos. 22-CA-223734 22-CA-223942

RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS

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I. INTRODUCTION.

On April 24, 2020, Administrative Law Judge Benjamin W. Green ("ALJ") issued his Decision ("ALJD") in this matter. Therein, the ALJ erroneously concluded that Respondent HMH[1] , despite not making a bargaining proposal, had unlawfully "dealt directly with bargaining unit employees in violation of Section 8(a)(5) and (1) of the Act by announcing its desire to changes their terms and conditions of employment without providing the Union adequate advanced notice and bargaining proposals." (ALJD at 18:3-5) HMH excepts to this flawed conclusion of law.

HMH also excepts to the ALJ's numerous factual and legal errors that buttressed his mistaken conclusion that HMH's May 22, 2018[2] "harmonization" communication to its entire 33,000 workforce describing anticipated changes to its ***non-union team members'*** employment terms somehow constituted unlawful direct dealing vis-à-vis the 3,000 team members represented by Charging Party Health Professionals and Allied Employees ("HPAE" or "Union"). Upon consideration of HMH's exceptions[3], the National Labor Relations Board ("NLRB" or "Board") should sustain them, correct the errors made by the ALJ and reverse his flawed conclusion that HMH dealt directly with its HPAE-represented team members, in violation of Section 8(a)(1) and (5) of the National Labor Relations Act ("NLRA" or "Act").

II. STATEMENT OF FACTS.

The operative facts are not extensive and are largely undisputed. HMH resulted from the July 1, 2016 merger between Hackensack University Medical Center and Meridian Health. (Tr.

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[1] Individual Respondents Southern Ocean Medical Center ("SOMC"), Jersey Shore University Medical Center ("JSUMC") and Palisades Medical Center ("PMC") are acute care hospitals affiliated with Hackensack Meridian *Health* ("HMH"). The Harborage is a long-term care facility, adjacent to PMC and affiliated with HMH. Unless required by context to be identified separately, Respondents are collectively referred to as "HMH." HMH refers to its employees as "team members" and that term will be used herein.

[2] All dates herein are in 2018, unless otherwise specified.

[3] HMH's exceptions to the ALJD are filed contemporaneously herewith and incorporated herein.

176:2-5)[4] At the time of trial[5], HMH had about 33,000 team members working in more than 200 separate locations. HPAE represented about 3,000 team members at just four of those locations – three acute care hospitals (SOMC, JSUMC and PMC), and a long term care facility (The Harborage). (ALJD 2:12-33) In other words, about 90% of HMH's team members were not represented by HPAE.

As a result of the merger and other post-merger acquisitions, HMH found itself in an operationally untenable position. (Tr. 178:9-24) Its disparate facilities operated under an equally disparate set of policies, procedures and benefits plans. According to HMH VP of Human Resources Barbara Powderly:

> We came together in July of 2016. And at that point we really were bringing five separate organizations together. I mean obviously Hackensack and Meridian Health, but also Harborage, Palisades, and Raritan Bay at the time all coming together. So we came into this merger with very different systems, policies, practices. And so from the time of the merger, our co-CEOs made it clear that it was really – the imperative was to really come together as one HMH, one organization. So that was really the concept of harmonization.

(Tr. 178:10-18) Obviously, HMH could not function efficiently with different parts of its network operating with different employment terms and conditions. HMH, therefore, determined to "harmonize", or consolidate, these disparate platforms into a manageable set of employment terms, which it intended to implement for the 90% of its team members that HPAE did not represent. (Tr. 176:6-13; 177:7-12; 178:9-24; 215:2-21)

The harmonization process turned out to be more complex and time-consuming than HMH had contemplated. Ms. Powderley explained that harmonization essentially commenced on the date of the merger and continued for the next 18 months as HMH "look[ed] at all of our

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[4] Herein, citations to the ALJD will be in the form of "ALJD page:line;" references to the hearing transcript will be in the form "Tr. page:line;" references to HMH's exhibits will be in the form "R-__;" and references to General Counsel's exhibits will be in the form "GC-__."

[5] The case was tried on January 14-15, 2020 in Newark, NJ.

policies, our procedures, and [came] to agreement on what those new policies would be." (Tr. at 179:14-16)

The prolonged harmonization process impacted HMH's 2017 labor negotiations with HPAE. Specifically, HMH's collective bargaining agreements ("CBA") with the Union at the three covered acute care hospitals expired on the following dates: SOMC and JSUMC on July 31, 2017 and PMC on June 1, 2017.[6] HMH first raised the prospect of significant changes resulting from harmonization with HPAE in the summer of 2017 by informing it of the planned harmonization process.[7] HMH explained the ongoing process as a principal basis for its desire for the one-year contract renewals it sought, and ultimately obtained, from HPAE. (Tr. 45:11-46:6, 225:10-226:11 179:25-180:22) In 2018, HMH expected to bargain with HPAE over whether and how the final harmonized terms, automatically applicable to its 30,000 non-represented team members, might be negotiated into successor CBAs applicable to the Union's members.

On March 29, the parties opened their 2018 negotiations for successors to the CBAs expiring at the four HPAE-represented facilities. (ALJD at 3:37-38) Between that date and May 22 (the date HMH published the harmonization materials to its entire workforce via the revised TeamHMH.com website), HMH did not make any bargaining proposals relating to any economic issue. (ALJD at 4:1-10) In fact, HMH did not make any economic bargaining proposals until "late-July or August."[8] (ALJD at 4:9-10; Tr. at 120:8-10, 131:23-132:2)

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[6] The CBA in force at the Harborage did not expire until May 17 and, therefore, was not up for renewal in 2017.

[7] In the 2017 negotiations, HMH was open about the reasons it sought one-year contracts. HMH advised the Union of its ongoing harmonization process and explained that it could not make long-term commitments on benefits and working conditions, because those topics still were under review. HMH further advised the Union that it would have to bargain in good faith over the extent to which the final harmonized terms would be included in any CBA. (ALJD at 2:35-3:1-4; Tr. 45:11-46:6, 225:10-226:11)

[8] The parties exchanges non-economic proposals in May. (ALJD at 4:8)

On May 19, HMH's lead negotiator and outside labor counsel, Joseph C. Ragaglia, emailed Fred DeLuca, HPAE's Director of Member Representation, about the conclusion of the harmonization process and HMH's intention to publish the resulting materials to its entire workforce:[9]

> Missed you at negotiations this week and wanted to catch up. As you know HMH officially launched the "One Mission, One Vision, One Culture" harmonization program last month by highlighting work already completed in this area and foreshadowing the harmonization program over the next few months. As part of the next step in this program HMH will be sharing updated information on the harmonization with all of its 35,000 team members starting Tuesday May 22nd. This information will include a number of topics some of which include the harmonization of a number of areas that touch on terms and conditions of employment. Let me be clear, and it will be made clear to Team Members, these changes will not go into effect until January 1, 2019 or later. It is impossible, and counter to the HMH ONE culture, to segregate out your members from receiving this information, some of which concerns mandatory subjects of bargaining. ***Consequently we will have the appropriate disclaimers and acknowledgement that for all union represented team members "HMH is legally required to bargain with the union regarding mandatory subjects and it will continue to do so."*** To that end we would like to share this information with HPAE before Tuesday.
>
> We are in negotiations with the Harborage and HPAE on Monday May 21st. Given the lack of negotiation dates for the Harborage we do not want to disrupt the day of negotiations but ***we are in the process of arranging a preview of the information regarding harmonization for you and your team for Monday afternoon sometime after 4 pm. We believe that it is important that HPAE has a chance to review the information before it is accessible by your members and be prepared for any questions your members may have. Once this process and negotiations are complete, HMH hopes that all team members will enjoy the same benefits, but obviously the negotiations process may result in variations in certain areas compared to the benefits enjoyed by other team members***. I will call you so we may coordinate.

(ALJD at 4:14-41 (citing GC-26) (emphasis added))

Mr. DeLuca responded minutes later:

Joe thanks for the update

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[9] Mr. DeLuca participated in the 2018 negotiations and supervised HPAE Staff Representative III Richard Halfacre and HPAE Staff Representative Djar Horn, who had direct responsibility for the PMC/The Harborage and SOMC/JSUMC negotiations, respectively.
(ALJD at 3:30-35)

> All the topics are mandatory subjects of bargaining the employers managers have been dealing directly with our members telling them what proposals will be out there before any presentation to the bargaining team-

(ALJD at 4:47-50 (citing GC-26))

Mr. Ragaglia ended his exchange with Mr. DeLuca with this email:

> We will certainly investigate if you give us details, and remedy if necessary, but two initial thoughts: ***1. Managers have not been briefed on any proposals or terms and conditions that could apply to HPAE members***; and 2. The information that will be presented by HMH to team members on Tuesday has not been finalized. ***In fact it is my understanding that it was made clear to leaders what was subject to negotiations.***

(ALJD at 5:6-11 (citing GC-26)) Mr. DeLuca then forwarded this entire email exchange to his subordinates, Mr. Halfacre and Ms. Horn, thereby putting them on notice of HMH's harmonization communication plans by no later than midafternoon on May 19. (GC-26)

HMH did not complete the harmonization materials it intended to distribute to its entire workforce on May 22 until about midday of May 21. (ALJD at 22-28 (citing R-5, R-6) Shortly thereafter, Mr. Ragaglia and Mr. Halfacre discussed Mr. Ragaglia's intention to make the harmonization-related presentation described in his May 19 email. At about 3:00 p.m. that day, Mr. Ragaglia shared the harmonization materials with The Harborage bargaining committee, including Messrs. DeLuca and Halfacre. (ALJD at 5:13-44) Because HMH had not released publically these materials on the TeamHMH.org website or elsewhere, Mr. Ragaglia did not give the Union a hard copy of his presentation or review the materials "live" on that website. Instead, he presented a PowerPoint slide show of the materials on a wall of the meeting room. (Tr. 195:9-196:4; 227:2-23; GC- 8) Mr. Ragaglia's presentation covered a broad range of harmonization-related changes, which HMH intended to implement for its non-represented team members on January 1, 2019. (*Id.*) Many of the topics reviewed by Mr. Ragaglia related to

topics that, for the HPAE-represented team members, constituted mandatory subjects of bargaining. (*Id*.)

As Mr. Ragaglia explained, he presented the harmonization materials to the Union, going through them page-by-page, "walk[ing] through the website the way that an individual would walk through it once it goes live." (Tr. 227:2-23, GC-8) Although each page of GC-8 did not contain a disclaimer, both Mr. Ragaglia and Ms. Powderly explained, without contradiction, that the disclaimer was on the bottom of each page on the actual version of the website and would be seen by every team member viewing the live website.[10] (*Id*., Tr. 195:9-196:4)

The fourth slide of Mr. Ragaglia's presentation contained the following disclaimer:

> ***We are required by law to deal with the unions on behalf of unionized team members, and we will continue to do so. We will only negotiate with the unions, not with individual unionized team members***.

(GC-8 at 4 (emphasis added); ALJD at 5:30-51) This disclaimer appeared on every page of the website version of the harmonization materials, albeit in a smaller font. (ALJD at 6:4-7; GC-8 at 4) At the hearing, Mr. Ragaglia explained that this was his "standard" disclaimer language, intended to show that an employer was not dealing directly with its union-represented employees. Mr. Ragaglia included the disclaimer on the harmonization materials because (1) the law requires an employer to communicate with a union before communicating with represented employees; (2) HMH wanted to be transparent about what it was going to distribute to its non-union team members; and (3) he wanted to the Union to understand that the publication of these materials was not an "end run" around the bargaining process. (Tr. 227:25-231:11)

[10] As discussed in greater detail below, Mr. Ragaglia presented the live version of the TeamHMH.com website containing the harmonization materials to the Palisades bargaining committee on May 22, with participants in that meeting using their own computers to follow the presentation. (*Id*., Tr. 223:17-224:8)

In addition to these preview sessions for HPAE bargaining committees, HMH provided unprotected links to the live TeamHMH.com website to HPAE staff before the site was available to HMH's workforce. (GC-6, R-3, Tr. 231:22-25) Mr. Ragaglia shared a link to the live website with Mr. DeLuca and Mr. Halfacre the morning of May 22. (R-3)

At 9:15 a.m. on May 22, the Union posted the following message on its Facebook page:

> In Harborage Negotiations yesterday, management gave us a preview of changes that they intend on making across the health system to standardize their benefits. They will be announcing this plan today in many of their facilities and possible ours. These areas included:
>
> -Health insurance plan design changes
> -PTO system Changes
> -Extended sick and short term disability changes
> -Defined contribution plan changes
>
> ***Management can NOT simply implement these changes in HPAE locals without negotiating with us first. So these announced changes, may or may not affect our members at all. Our bargaining team will be examining all proposed changes and determine whether they are in all of our interest or whether there are better alternatives. The final outcome will be voted on by all the HPAE members.***
>
> Be prepared to communicate with your colleagues from your floor to spread the above message. Management wants to make this seem to our members like a done deal to strip the fight out of them so let's make sure not to let them do that!
>
> We can answer questions about this in our meeting tonight at 5.30 pm and 7.45 pm for Local 5058, or by phone any time at (732) 774 -9440 ext. 215. We will work on a flyer to explain all of this for members and ask that you be prepared to help distribute them on your floor.

(R-1 (emphasis added); ALJD at 8:45 – 9:20)

About 25 minutes later, HMH human resources representative Victoria Rivera Cruz emailed Ms. Horn and the presidents of the HPAE locals at SOMC and JSUMC: (ALJD at 9:22-50; GC-6) In large measure, Ms. Rivera Cruz's email parroted Mr. Ragaglia's May 19 email to Mr. DeLuca. Mr. Rivera Cruz added:

> I understand that you were unable to attend the meeting with HPAE leadership yesterday but we presented a preview of this information to HPAE representatives Fred DeLuca, Rich Halfacre and Phil Denniston as well as the Local 5097 bargaining committee. We will be discussing it with the bargaining committee for Local 5030 today. The website is now live and you can view the information first hand at www.TeamHMH.com. A letter will go out electronically later today that will outline the harmonization areas. Again, we believe that it was important that HPAE has a chance to review the information before it is accessible by your members and be prepared for any questions your members may have. Please contact me with any questions or concerns you, your local leadership or members may have.

(GC-6) Shortly after Ms. Rivera Cruz provided website access to Ms. Horn, HMH removed the password protection from the TeamHMH.com website, making it accessible to the public, including all of its 33,000 team members.

At 11:06 a.m., HMH emailed a flyer to all of its team members describing the completion of the harmonization process. (ALJD at 10:9 – 11:14; GC-10) That flyer stated in part:

> As part of that commitment, we are previewing a series of policy and benefit changes. While most of these changes will not go into effect until January 1, 2019, we felt it was important to share the information as soon as we were able. Please keep in mind that many of the details are still in progress, and subject to regulatory and operational considerations, which may result in some modifications - we'll continue to provide updates throughout the year.
>
> . . .
>
> In the meantime, please visit the new and improved www.TeamHMH.com, where you'll find additional details about these enhancements and have the opportunity to submit questions. Of course, your leaders and HR representatives are always available to help, as well. Please remember, most of these changes don't take effect for more than six months, on January 1, 2019.

(*Id.*) This flyer, which HMH also handed out to team members on May 23, contained a disclaimer identical to the one Mr. Ragaglia reviewed with the Union at his May 21 presentation. (ALJD at 11:16-22; GC-7, 10)

Later that day at a PMC bargaining session, Mr. Ragaglia made a presentation similar to the one he had made for The Harborage unit the previous day. Attendees at that presentation used their own computers to view the presentation, since the material was then available on the

TeamHMH.com website. (ALJD at 11:52-12:3) Mr. Ragaglia testified that prior to that presentation, he had drafted a second, longer disclaimer, which stated:

> * We are required by law to negotiate about mandatory subjects of bargaining with the unions that represent a small number of Hackensack Meridian *Health* team members. Some of the labor contracts between Hackensack Meridian *Health* allow respective represented team members to automatically receive the benefits non-union team members receive. Others do not. We are currently are in negotiations with some unions that represent team members, and negotiating about of [sic] the benefits referenced on this website. We are committed to negotiating in good faith as required by law, and we will not engage in any direct dealing with union represented team members. Union represented team members should contact their respective union about any questions they have."

(Tr. 233:17-238:22)

On July 13, HPAE filed the unfair labor practice charge in in this case, Case No. 22-CA-223734. (GC-1(a)) In that charge, the Union broadly accused HMH of bargaining in bad faith. Specifically, the Union claimed that HMH "unilaterally presented a new set of terms and conditions of employment (the "TeamHMH terms") concerning mandatory subjects of bargaining directly to Union -represented employees at [PMC, The Harborage, JSUMC, and SOMC]; the announcement of the Team HMH terms (i) evidences HMH's absence of sincere intent to bargain about the terms and conditions during ongoing contract negotiations; (ii) presents the TeamHMH terms as a fait accompli; and (iii) constitutes direct dealing, all.in violation of Section 8(a)(5) of the National Labor Relations Act. (*Id.*) After an investigation, the Region dismissed the surface bargaining and *fait accompli* allegations, leaving only the direct dealing allegation to be addressed in this case. (Tr. at 41:16-42:24)

III. ARGUMENT.

A. The ALJ Inexplicably Failed To Apply The Board's Well-Established Law On Direct Dealing.

The Board's direct dealing analysis is well settled. The fundamental inquiry in a direct dealing case is whether the employer has chosen "to deal with the Union through the employees,

rather than with the employees through the Union." *NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 134 (2d Cir. 1986) (quoting *NLRB v. General Elec. Co.*, 418 F.2d 736, 759 (2d Cir. 1969), cert. denied, 397 U.S. 965 (1970)); see also *Facet Enters. v. NLRB*, 907 F.2d 963, 969 (10th Cir. 1990) (same). Thus, "an employer who bypasses the bargaining representative to make offers regarding the terms and conditions of employment directly to employees violates Section 8(a)(5) and (1) of the Act." *Central Management Co.*, 314 NLRB 763, 767 (1994) (citing *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-84 (1944)).

The Board has repeatedly held that to prove a direct dealing violation, the General Counsel must prove that: (1) the employer communicated directly with its union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) the communication excluded the union. *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000) (citing *Southern California Gas Co.*, 316 NLRB 979 (1995)). Through its repeated use of the word "and" in this statement of the law, the Board requires that each direct dealing element must be proven in order to find a violation to the Act.

Here, the ALJ inexplicably failed to cite or apply the established elements of a direct dealing violation to this case. Instead, the ALJ concocted a variety of *ad hoc* legal standards that have no basis in the Board's direct dealing law. Specifically, the ALJ created and applied the following legal standards:

- HMH violated the Act "by announcing its desire to change their terms and conditions of employment without providing advance notice and contract proposals to the bargaining representative of those employees, [HPAE]. (ALJD at 1)

- "An employer may be held to have violated the Act by revealing to unit employees its intention to alter their wages, hours, and other terms and conditions of employment without giving the union adequate advance notice to discuss the prospective changes with employees or engage in meaningful bargaining." (ALJD at 12:11-14)

- "Although this is not a case that involves a unilateral change, it is useful to consider Board authority regarding exigencies that allow an employer to expedite bargaining and make certain unilateral changes in advance of overall contractual impasse." (ALJD at 17:6-9, citing *RBE Electronics*, 320 NLRB 80, 81-82 (1995))

- HMH "unlawfully failed to provide the Union with adequate advance notice and bargaining proposals before publicizing to unit employees its desire to change their terms of employment. ." (ALJD at 17:38-40)

While each of the ALJ's "formulations"[11] may describe ***factual circumstances*** present in a case in which a direct dealing violation was found, they do not – and cannot – substitute for the rigorous application of the Board's established legal standards. As discussed below, the ALJ could not have found that HMH engaged in illegal direct dealing because it did not bypass HPAE or make an offer to establish or change terms and conditions of employment directly to its HPAE-represented team members.

B. HMH Did Not Publish The Harmonization Materials To Its Entire Workforce In Order To Establish Or Change The Terms And Conditions Of Employment Of Its HPAE-Represented Team Members Or To Undercut The Union's Role In Bargaining.[12]

1. *HMH Did Not Communicate With Its Entire Workforce In Order To Establish Or Change The Employment Terms Of Its HPAE–Represented Team Members.*

HMH did not publish the harmonization materials to its entire 33,000 member workforce in order change the employment terms of its 3,000 HPAE–represented team members. To the contrary, HMH published those materials to notify its 30,000 non-union team members of changes to ***their*** terms and conditions of employment, to be effective on January 1, 2019.

Further, the harmonization materials did not constitute a bargaining proposal and the parties never treated them as such. (ALJD at 4:9-10; Tr. 120:8-10, 131:23-132:2; 140:24-

[11] Except that relating to exigent circumstances, which clearly inapplicable.

[12] HMH acknowledges that it communicated directly with its HPAE-represented team members, after giving the Union notice of both its intention to communicate and the content of those communications.

141:17) The ALJ correctly found that HMH did not make bargaining proposals on economic issues until about two months after it disseminated the harmonization materials to all team members. (ALJD 14:30-33) Since they were not a bargaining proposal, HMH's publication of the harmonization materials cannot be an offer to HPAE's members to change their terms and conditions of employment. *Central Management Co., supra*.

Beyond the fact that HMH did not make an economic bargaining proposal until long after May 22, the disclaimers, as explained to the Union's leadership by Mr. Ragaglia and contained on the materials distributed to all team members, established that HMH did not intend to, and legally could not, change the terms and conditions of HPAE's members without first bargaining in good faith with the Union regarding them. (Tr. at 140:13-141:17, 153:8-23) The Union clearly understood[13] this and advised its members accordingly:

> Management can NOT simply implement these changes in HPAE locals without negotiating with us first. So these announced changes, may or may not affect our members at all. Our bargaining team will be examining all proposed changes and determine whether they are in all of our interest or whether there are better alternatives. The final outcome will be voted on by all the HPAE members.

(R-1)

These facts – the harmonization materials were not a proposal, they announced changed employment terms for HMH's non-union employees and the inclusion of disclaimers – distinguish this case from all of those relied on by the ALJ. Those cases, unlike the case at bar, involved bargaining proposals delivered to a union and/or its members in dubious circumstances with the intention to make changes to employment terms. For example, in *Detroit Edison*, 310 NLRB 564 (1993), the case found controlling by the ALJ, the employer delivered a "sweetened" job security proposal to the chief unit representative while he was "at home on vacation and

[13] Moreover, HPAE's members also understood these communications to mean the same thing – HMH had to bargain over these issues, and no change could be made until that process was completed. *See infra* at 17-18.

painting his house," and then distributed it to unit employees a few days later without further involvement or consent from the unit representative. *Id*. at 565. This occurred during a stalemate in bargaining over that very issue. *Id*. at 575. Notably, the employer's "sweetened" proposal contemplated an immediate and significant change to disputed terms of employment. Here, the harmonization materials were not a bargaining proposal, did not seek to change to employment terms of HPAE's members, related specifically to the 90% of HMH's team members not represented by any union and were presented to the Union in advance.

The ALJ's reliance on *Overnite Transportation Co.*, 329 NLRB 990 (1999), *enf. denied in relevant part*, 280 F.3d 417, 432-433 (4th Cir. 2002)., is similarly misplaced. First, the ALJ failed to note that the Fourth Circuit denied enforcement to the Board's direct dealing finding in that case because there is no "rule requiring employers to delay informing [their] employees of a proposal until the union has some period of time to consider it. *Id*. Communications to employees that inform them of their employer's bargaining position constitute no violation." 280 F.3d at 432 (citing *Americare Pine Lodge Nursing & Rehab. Ctr. v. NLRB*, 164 F.3d 867, 876-77 (4th Cir. 1999)).[14] Second, the employer there sent a proposal to the union via overnight mail, made a presentation on that proposal directly to the unit employees one day later and thereafter resumed negotiations with the union. *Overnite*, 329 NLRB at 1047. Third, this conduct took place as part a wide-ranging pattern of serious labor law violations by an employer willing to go to great lengths to combat union organizing. There is no analogous conduct in this case.

Aggregate Industries, 359 NLRB 1419 (2013) adopted by three-member Board in 361 NLRB 879 (2014), enf. denied on other grounds in *Aggregate Industries v. NLRB*,

[14] HMH acknowledges that the Board has not adopted the rationale of the Fourth Circuit in that. HMH respectfully submits that the Board should adopt it in this case.

824 F.3d 1095 (D.C. Cir. 2016), also does not support the ALJ's direct dealing finding. In that case, the employer presented a "wage transition proposal" to the union on one day and then directly to the union-represented drivers on the following day. The employer distributed the proposal to its drivers, along with an acceptance form, which the drivers had to complete as a condition of continued employment. Unsurprisingly, the Board found a violation on those facts. 359 NLRB at 1424.

Roll & Hold Warehouse and Distribution Corp., 325 NLRB 41 (1997), was a unilateral change case, not a direct dealing case. *Id*. ("The judge, also, however, dismissed an 8(a)(5) and (1) allegation concerning the Respondent's unilateral implementation of a written point system attendance policy. . . . We disagree with the judge's disposition of this issue.") Although the Board cited *Detroit Edison, supra*, in its decision, it was in the context of rejecting the employer's defense that the union had waived its right to bargain over the unilateral change at issue. *Id*. at 42.

Finally, the Board's decision in *American Pine Lodge Nursing*, 325 NLRB 98 (1997), enf. denied in relevant part 164 F.3d 867 (4th Cir. 1999) does not support the ALJ's direct dealing finding. In that case, the Board found a direct dealing violation where, *inter alia*, the employer sent a copy of its proposal to the union on the same day it provided it to the employees. The Board found that that discrete violation was accompanied by "various conduct constituting unlawful direct dealing with bargaining unit employees" for about a thirty-day period. *Id*. Further, the Board determined that "Respondent's direct dealing with bargaining unit employees could have reasonably led those employees to believe that they could obtain better terms and conditions of employment from the Respondent by rejecting the Union." *Id*. at 98-99. The Board concluded that "the evidence is quite persuasive that the Respondent's goal was direct

dealing with unit employees for the purpose of undermining the Union's authority generally and influencing the employees to reject the Union as their bargaining representative. *Id*. at 99. Clearly, HMH did not engage in analogous conduct in this case.

The cases relied on by the ALJ simply do not support his direct dealing conclusion in this case. The harmonization materials were not a bargaining proposal and, thus, not an offer to change the employment terms of HPAE's members. (ALJD 14:30-33) HMH communicated with all of its team members, represented and unrepresented, about changes it intended to make to the employment terms of its non-union team members. HMH shared the content of its communication with HPAE in advance. HMH included a disclaimer on the harmonization materials that put any reader, including HPAE and its members, on notice that HMH knew that it had a legal obligation to bargain in good faith with the Union before making any changes thereto. These facts do not establish that HMH distributed the harmonization materials "for the purpose of establishing or changing wages, hours, and terms and conditions of employment" of its HPAE-represented team members; nor do they otherwise support a direct dealing violation.

2. *HMH Did Not Communicate With Its Entire Workforce Regarding The Harmonization Materials In Order Undercut The Union.*

The ALJ's conclusion that HMH's publication of the harmonization materials to its entire workforce undercut, or undermined, HPAE's role as the bargaining representative of its members is based on his fundamental misapprehension on the nature of those materials. The ALJ said the following with respect to undercutting the Union:

- Accordingly, unit employees were made aware of the Respondent's anticipated changes long before the Union had an opportunity to review actual proposals, discuss them with employees, and engage in bargaining. This could only serve to undermine the Union as the bargaining representative of unit employees. (ALJD at 14:24-27)

- . . . the Respondent's Growing Together harmonization rollout affirmatively advised employees, including unit employees, in largely unqualified language, that their benefits would change. These communications were more likely (not less) to undermine the union than if they were accompanied by actual proposals and included a clear statement that such proposals might not be implemented or might be modified as a result of collective bargaining. (*Id*. at 3-8)

- Since the Respondent's rollout of its harmonization plan would tend to undermine the Union and the bargaining process, it is it is not protected by Section 8(c) of the Act. (*Id*. at n.11)

- Thus, the Respondent did not establish that time was of the essence to such an extent that it had to publicize the harmonization plan to employees on May 21. Once again, the Respondent made a choice to present its plan at a time and in a manner that was likely to undermine the union as the bargaining representative of unit employees.[15] (ALJD at 17:32-35)

Each of these conclusions rests on the erroneous foundation that the harmonization materials somehow constituted HMH's "anticipated changes" to the terms and condition of HPAE's members. That is simply wrong. The harmonization materials announced "anticipated changes" to HMH's non-union employees.

The undisputed facts disclose the ALJ's clear error on this point. The harmonization materials were not a bargaining proposal to change the economic terms contained in the various CBAs. (ALJD at 4:9-10, 14:30-33; Tr. 120:8-10, 131:23-132:2, 140:24-141:17) Rather, HMH made economic proposals on those issues for all HPAE units later in the summer and the parties thereafter bargained to agreement on all such issues. (ALJD at 4:1-10) Through its pre-publication communications with the Union, HMH was clear that the harmonization materials

[15] Ms. Powderley explained that it was imperative for HM to publish these communications in the Spring 2018, in order to be prepared for its October 2018 open enrollment deadline and so that HMH leaders could explain the harmonization changes to team members across the entire network. (Tr. 215:2-21) According to Ms. Powderley, communicating at that time and in that way was imperative so that all 33,000 team members could "make an informed decision about their plans." (Tr. 215:2-9) Ms. Powderley characterized that open reenrollment as "active" because all team members would affirmatively have to make new benefits choices, since all the benefits choices would be changed. Prior to harmonization, team members had participated in "passive" enrollments wherein they would automatically be reenrolled in their current plan, if they did not choose a different plan. (Tr. 215:13-21)

applied to non-union team members ***only***. (GC-26) The disclaimers on the harmonization materials and Mr. Ragaglia's explanation of them established that HMH fully understood its obligation to bargain in good faith with the Union before making any economic changes. *Id.*

Here, HMH publicized the "anticipated" employment terms for its non-union team members, as of January 1, 2019. HMH did not propose, insist or dictate those "anticipated" employment terms for its non-union team members would be foisted on its team members represented by HPAE.[16] Because these materials did not relate to HPAE's members, HMH was privileged to publish them without advance notice to the Union. However, because HMH wanted the Union to be aware of, and prepared to discuss with its members, the changes it would implement for its non-union team members, HMH previewed those materials for the Union. Further, to make it clear that the harmonization materials were not a proposal or somehow a set of unilaterally imposed terms, HMH included appropriate disclaimers. (Tr. 194:3-196:4, 228:24-229:5; GC-7 at 3; GC-8 at 4; GC-10 at 6) There is nothing in this record that even hints that HMH published the harmonization materials to undermine the Union's position. In fact, HMH's pre-publications interactions with the Union establish that it acted appropriately to minimize any potential impact to the Union after the announcement of harmonization materials.

Finally, the ALJ failed to consider the uncontradicted testimony of SOMC bargaining unit member Milena Buckley and JSUMC bargaining unit member Nancy Gannon. According to Ms. Buckley, when she received the flyer regarding the harmonization materials on May 23, she immediately understood that HMH was obligated to bargain with the Union before changing her terms of employment. Ms. Buckley shared that understanding with her team members. (Tr. 86:5-8, 88:21-89:2) Ms. Gannon's testimony was to the same effect. She stated that when she

[16] Relevant here, the Region dismissed HPAE's bad faith/*fait accompli* unfair labor practice allegations.

discussed the flyer with her colleagues, "I said they have to negotiate with us for any changes that are in the contract." (Tr. 64:13-18)

C. HMH's Publication Of The Harmonization Materials Did Not Excluded Or Bypass The Union.

HMH did not exclude or bypass the Union when it published the harmonization materials to all of its team members on May 22. As noted above, the Union had been on notice for more than a year that the harmonization project was underway. In fact, the parties bargained one-year CBAs at SOMC, JSUMC and PMC in 2017 specifically because HMH had not completed the harmonization project by that time. (ALJD at 2:35-3:1-4; Tr. 45:11-46:6, 225:10-226:11) Further, the Union was aware that harmonization project was nearing conclusion well before the results were published. (GC-26 ("As you know HMH officially launched the "One Mission, One Vision, One Culture" harmonization program last month by highlighting work already completed in this area and foreshadowing the harmonization program over the next few months.")))

Regarding the actual publication of the harmonization materials, HMH notified the Union on May 19 that the materials would be released on May 22 ***and*** HMH assured the Union that it would preview the materials for HPAE before the release date. (ALJD at 4:14-41; GC-26) Mr. Ragaglia's email to Mr. DeLuca (forwarded on the Mr. Halfacre and Ms. Horn on May 19 at 2:20 p.m.) was clear on that point:

> . . . we are in the process of arranging a preview of the information regarding harmonization for you and your team for Monday afternoon sometime after 4 pm. We believe that it is important that HPAE has a chance to review the information before it is accessible by your members and be prepared for any questions your members may have. Once this process and negotiations are complete, HMH hopes that all team members will enjoy the same benefits, but obviously the negotiations process may result in variations in certain areas compared to the benefits enjoyed by other team members.

(*Id*.) Thus, by mid-afternoon on May 19, the HPAE staff members leading the four bargaining tables knew that HMH intended to publish the harmonization materials. Further, they knew that HMH had represented that "[o]nce this [harmonization] process ***and negotiations are complete***, HMH hopes that all team members will enjoy the same benefits, ***but obviously the negotiations process may result in variations in certain areas compared to the benefits enjoyed by other team members***. (GC-26 (emphasis added))

Two days later, HMH previewed the harmonization materials for HPAE's bargaining committee for The Harborage (including Mr. DeLuca and Mr. Halfacre). This presentation included the disclaimers Mr. Ragaglia had promised Mr. DeLuca would be included. (*Id*. ("Consequently we will have the appropriate disclaimers and acknowledgement that for all union represented team members [']HMH is legally required to bargain with the union regarding mandatory subjects and it will continue to do so.[']"); GC-8) Finally, HPAE had access to the TeamHMH.com website on the morning of May 22 for about 90 minutes before the site was opened to HMH's workforce. (ALJD at 9; R-3; GC-6) That amount of advance access to the live website was appropriate given that HMH's leaders had gotten access to the live website less than 24 hours earlier. (R-5; R-7) In short, HMH shared the harmonization materials with the Union virtually at the same time that they were finalized and available.

HMH submits that these facts show that HMH did not exclude, or bypass, the Union when it published its harmonization materials to its entire workforce on May 22. HMH submits that no direct dealing case (and certainly none of the cases relied on by the ALJ) has found a violation based on this fact pattern:

- The employer tells the union representing its employees in advance that it is going to communicate with its entire workforce regarding upcoming changes to its non-union employees' employment terms. (ALJD 4:12-5:44)

- The employer tells that union in advance that the communication will include a disclaimer stating that the employer understands that it must bargain with the union before making any changes to its members' employment terms. (ALJD 4:12-6:16)

- The employer previews the communication (including the disclaimer) for the union. (*Id*.)

Based on these facts, HMH did not exclude, or bypass, the Union.

Although (as discussed above), the harmonization materials were not a bargaining proposal and, thus, not intended to change the HPAE members' employment terms, many direct dealing cases, including those cited by the ALJ, identify a union's "surprise" or an inability to respond to an employer's proposal as a factor in finding a violation. That factor is not present in this case. Immediately after receipt of Mr. Ragaglia's email on May 19, the Union could have communicated to its members that HMH intended to publish the harmonization materials and relayed the disclaimer/bargaining assurances that Mr. Ragaglia had provided. The Union, however, did not take that opportunity to communicate with its members, via Facebook or other media. Immediately following the preview of the materials on May 21, the Union could have communicated with its members by the early evening about the upcoming release of the materials and relayed the disclaimer/bargaining assurances that Mr. Ragaglia again had provided. The Union once again failed to act promptly. It waited until the following morning to communicate with its members via Facebook. Even then, the Union's Facebook post issued well before the TeamHMH.com website could be accessed by team members. In that post, the Union its advised its members that HMH could not take unilateral action and that bargaining was required before any changes could be made. (R-1) Here, HMH gave HPAE real-time notice and updates as to when the harmonization materials would be published; this was more than adequate notice and provide adequate time for the Union communicate with its members. *Compare United Technologies, Corp.*, 274 NLRB 1069, 1074 (1985), enforced, 789 F.2d 121 (2d Cir.

1986) (no direct dealing violation where the employer "acknowledged the [u]nion's rightful role as the statutory representative"); and *United Technologies Corp*, 274 NLRB 609, 610 (1985) (no direct dealing violation where the employer "fully acknowledged the [u]nion's rightful role as the employees' statutory bargaining representative") with *Armored Transport, Inc.*, 339 NLRB 374, 377 (2003) (finding direct dealing regarding the employer's presentation of its proposal to employees where the employer sought to induce its employees to decertify the union).

D. HMH's Publication Of The Harmonization Materials Is Privileged Under Section 8(c) Of The Act.

Section 8(c) of the Act recognizes an employer's right to free speech when dealing with its employees:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c). An employer is, therefore, free to communicate with its employees "so long as the communications do not contain a threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969).

An employer's communication is protected by Section 8(c) and does not violate Section 8(a)(5) of the Act as long as there is (1) no effort "to bargain directly with the employees" or (2) no "invitation to them to abandon their representative to achieve better terms directly from the [employer]." *United Technologies*, 274 NLRB at 1074. *See also Lear Siegler, Inc.*, 283 NLRB 929, 930 (1987) ("[t]he [employer] has a right to communicate its position to employees"), enf'd in relevant part, 890 F.2d 1573 (10th Cir. 1989). Notably, the Act does not afford a union the right to review or approve of an employer's communications to its employees. An employer is

entitled to communicate with employees "outside the presence of the union". *Globe Business Furniture, Inc.*, 290 NLRB 841, n.2 (1988).

HMH's communication of the harmonization materials to its entire workforce on May 22 was privileged under Section 8(c). As established, the communication was not a bargaining proposal and, thus, HMH did not attempt to bargain directly with HPAE's members. Further, the ALJ found that HMH did not "disparage the Union or induce unit employees to abandon their bargaining representative" by making its "initial harmonization presentation to employees." (ALJD at 15:15-18)

HMH did nothing more than publish important information to its entire workforce announcing changes to employment terms that would impact 90% of its team members as of January 1, 2019. The announced changes did not, and as a matter of law, could not affect the existing terms and conditions of employment of HPAE's members – and HPAE knew that. (GC-6; R-3; GC-8 at 4; ALJD at 5:30-51, 6:4-7; Tr. 231:22-25)

There is no precedent in Board law for the principle created by the ALJ that an employer must make a bargaining proposal to the union representing a small percentage of its employees before announcing changes to the employment terms of the vast majority of its employees the union does not represent. (ALJD at 15:3-5 ("I find the Respondent's failure to present bargaining proposals before rolling out its harmonization plan to be a critical factor in distinguishing the instant case from *United Technologies Corp.*, 274 NLRB 609, 610 (1985).") Expanding on this sophistry, the ALJ wrote: "Here, however, [HMH] presented the harmonization plan directly to employees at least 2 months before it made economic proposals to the Union. Thus, the Union was not in a position to address those proposals with unit employees or negotiate over harmonization at the bargaining table." (ALJD 15:9-11)

There are two glaring holes in the ALJ's contrived analysis. First, HMH did not make a bargaining proposal. Thus, there was nothing for the Union to respond to, in the bargaining context. Second, HMH did not limit the Union's ability to respond to the harmonization materials in whatever way it might have chosen. The Union could have said or done whatever it wanted tin response to HMH's communication of the harmonization materials. In fact, before the TeamHMH.com website went live on May 22, HPAE posted a message on its Facebook page explaining (inartfully) its reaction to the harmonization materials to its members. (R-1) It could have, but did not, publish such communications on May 19, after Mr. Ragaglia advised Mr. DeLuca that HMH would soon release the harmonization materials. Clearly, the ALJ's conclusion HMH had to make a bargaining proposal to HPAE before announcing employment changes affecting its non-union team members is patently erroneous.

Without citation to any supporting legal authority, the ALJ improperly criticizes HMH for the timing and manner of its publication of the harmonization materials. (ALJD at 17:16-35) This is well beyond the pale, as Section 8(c) permits an employer to communicate lawfully with its employees as it sees fit. *Globe Business Furniture, Inc.*, *supra*. The ALJ's critique displays a complete misunderstanding of both the harmonization process and corporate communications. Ms. Powderley explained the complexity of the harmonization process. (Tr. 176:6-13; 177:7-12; 178:9-24; 215:2-21) She explained that HMH had engaged several consultants to assist it in the development process. She explained, supported by contemporaneous emails, that the harmonization materials were not complete and ready to be viewed by HMH's leaders until around midday on May 21 – just before Mr. Ragaglia's initial presentation to HPAE and only one day before the materials were made public. (Tr. 190:10-20; R-5; R-7) Aside from the

HMH's leaders and consultants, no HMH team members saw that the harmonization materials before HPAE saw them on May 21. *Id*.

HMH did not release or publicize the harmonization materials before they were complete. The reason for this confidentially is apparent – no employer would release a comprehensive, new compensation and benefits program applicable to 30,000 employees on a piecemeal or incomplete basis. The ALJ's suggestion that HMH could/should "have notified, consulted, and made proposals to the Union on a rolling basis, perhaps with some agreement as to confidentiality" is literally nonsensical. The harmonization materials announced employment terms for HMH's non-union team members. HMH had no obligation to involve the Union in any way in the development of employment terms for team members it did not represent. Here, HMH and HPAE exchanged bargaining proposals in late July or early August. Several months later, they reached agreement on successor CBAs for each HPAE-represented unit.

Finally, the ALJ suggests that HMH could/should have delayed its "rollout" of the harmonization plan to allow HPAE "to digest the information and act upon it accordingly." (ALJD at 17:28-29) Ms. Powderley explained that HMH needed to publish the harmonization materials when it did so that the affected team members could learn about the new benefits and make educated decisions about important benefit and employment decisions by the planned October open enrollment period. (Tr. 176:6-13; 177:7-12; 215:2-21) The ALJ is in no position to gainsay an employer's conclusion regarding how much time 30,000 individuals need to understand and make such important decisions.

E. If HMH Is Somehow Determined to Have Dealt Directly With Its HPAE-Represented Employees, Then The Disclaimers Included On The Harmonization Materials Constitutes A Defense To Any Such Finding.

As explained above, HMH told the Union that the harmonization materials would include "appropriate disclaimers and acknowledgement that for all union represented team members [']HMH is legally required to bargain with the union regarding mandatory subjects and it will continue to do so.[']" (GC-26) As promised, HMH included disclaimers on the presentation materials Mr. Ragaglia reviewed with the Union on May 21 and 22 and on every page of the harmonization materials published on TeamHMH.com. (GC-8; R-9; Tr. 225:10-226:11)

HMH included two disclaimers on the harmonization materials it reviewed with the Union on May 21 – a large version of the "standard" disclaimer on page 4 of GC-8 and a smaller version of the same disclaimer on each page of the materials. (GC-8) The disclaimer advised: "We are required by law to deal with the unions on behalf of unionized team members, and we will continue to do so. We will only negotiate with the unions, not with individual unionized team members." (*Id*.) The ALJ's concluded that this language was "a brief and broad statement of legal principle that would not necessarily convey to a layperson employee the Respondent's intent to withhold the implementation of benefit changes unless and until it negotiated with the Union in good-faith to agreement or impasse." (ALJD at 16:5-8) To the contrary, this disclaimer clearly and directly notified HPAE's members that HMH had a legal obligation to bargain with the Union and that it would not negotiate directly with HPAE's members. Nothing more was required.

A more fulsome disclaimer appeared on the "Tomorrow" page of the live version of the harmonization materials on TeanHMH.com and in Mr. Ragaglia's presentation to the Union on May 22. :

> *We are required by law to negotiate about mandatory subjects of bargaining with the unions that represent a small number of Hackensack Meridian *Health* team members. Some of the labor contracts between Hackensack Meridian *Health* allow respective represented team members to automatically receive the benefits nonunion team members receive. Others do not. We currently are in negotiations with some unions that represent team members, and are negotiating about of the benefits referenced on this website. We are committed to negotiating in good faith as required by law, and we will not engage in any direct dealing with union represented team members. Union-represented team members should contact their respective union about any questions they have.

(R-9[17]; Tr. 236:24-239:2)

Citing no cases, the ALJ also found that this disclaimer was not effective because "it offers more of an explanation why unionized employees might not share in improved benefits under the harmonization plan than an indication that unfavorable changes might not be implemented following good-faith negotiations." (ALJD at 17:42-45) Frankly, the ALJ's position borders on the absurd. This disclaimer indisputably puts any reader on notice of HMH's bargaining obligation, that HMH will bargain in good faith and that it will not deal directly with union-represented team members. This disclaimer is clear and effective.

Therefore and contrary to the ALJ's findings, these disclaimers, individually or collectively, constitute a valid defense to the General Counsel's purported prima facie case of direct dealing. (ALJD at 15:26-17:2) The ALJ muses that "the disclaimers are only relevant to the extent they were likely to be viewed by unit employees and how unit employees would be likely to interpret them." (ALJD at 15:47-48, n.12) The ALJ failed to grasp that, as explained by Mr. Ragaglia explained, a principal reason he included the disclaimers was to assure the Union that HMH was being transparent and not making an "end run" around HPAE. (Tr. 231:6-11) There was no dispute that the Union understood the purpose of the disclaimers and, in

[17] The ALJ erred by excluding R-9 from evidence under the "best evidence rule." (ALJD at 6, n.6; 7, n.7; 16:39-40)

response, advised it members that changes to employment terms and conditions would be subject to bargaining. (Tr. 64:13-18, 86:5-8, 88:21-89:2; R-1) Further, bargaining unit members Ms. Buckley and Ms. Gannon both testified that, after receiving the flyer announcing the harmonization materials, they discussed it with their coworkers. *Id.* Those HPAE-represented team members clearly understood that "this [the harmonization materials] cannot go forward until we have negotiations. So just read it [the flyer], questions, we'll discuss it, it will be brought up during negotiations." (Tr. 86:6-8, GC-7) This evidence clearly establishes the effectiveness of the disclaimer, as to both the Union and its members.

Finally, HMH takes issue with the ALJ's decision to exclude R-9 from evidence under the "best evidence rule" (ALJD at 6) Before addressing the substance of that decision, HMH notes that even if R-9 is excluded, Mr. Ragaglia testified compellingly regarding his drafting of the disclaimer contained on that document and the reasons he considered that to be necessary. (Tr. 194:17-196:4, 228:24-229:5) Further Mr. Ragaglia testified persuasively regarding the content of the TeamHMH.com harmonization materials contained in his May 22 presentation to the PMC bargaining committee, which occurred after the website could be viewed by the public. (Tr. 228:24-229:5) Importantly, Mr. Ragaglia testified from his recollection that the fulsome disclaimer was on the TeamHMH.com website before he was shown R-9. (Tr. 234:9-236:21) If Mr. Ragaglia was not able to recall from memory the precise verbiage of that disclaimer, then it was proper to show him R-9 to refresh his recollection as to the wording.[18] Mr. Ragaglia's

[18] The admissibility of the document used to refresh is not material. *Fraser v. Goodale*, 342 F.3d 1032, 1037 (9th Cir. 2003) ("Indeed, even inadmissible evidence may be used to refresh a witness's recollection.") (internal citation omitted)).

testimony, especially in the absence of any credible contrary evidence[19], establishes as a factual matter that the TeamHMH.com website included the fulsome disclaimer on May 22. *Id.*

Regarding R-9 itself, the ALJ should not have excluded it under the best evidence rule. (ALJD at 6) That rule provides that the original writing, recording or photograph in question must be produced in evidence. However, Fed.R.Evid. 1004 eliminates this requirement where "all the originals are lost or destroyed, and not by the proponent acting in bad faith." Here, the TeamHMH.com website as it existed on May 22 did not exist and, therefore, could not be produced at the hearing. HMH did not act in bad in not preserving an image of the website on May 22. As Mr. Ragaglia explained, the website changed as circumstances changed – the disclaimer that was on the "Tomorrow" page existed on the benefits page at the time of the hearing. (Tr. 236:10-21) Because HMH's inability to produce an image of the website on May 22 was not a result of any bad faith on its part, R-9 should have been admitted.

IV. CONCLUSION.

For the foregoing reasons, Respondents Southern Ocean Medical Center, Jersey Shore University Medical Center, Palisades Medical Center and The Harborage respectfully urges the Board to find merit in their Exceptions to the Administrative Law Judge's Decision, and to dismiss the Complaint in its entirety.

Dated: June 17, 2020

Respectfully submitted,

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[19] The ALJ inappropriately admitted GC-28, even though Ms. Horn, the propounding witness, admitted that she had not seen the document before the hearing, did not who created, she did not know when or how it was created and she did not know if the document represented the entirety of the TeamHMH.com website on May 22 and 23. Tr. 265:13-267:4)

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondents' Exceptions to the ALJ's Decision and Brief in Support of Exceptions were served via electronic mail, this 17th day of June 2020, upon the following:

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